Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-742

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
Petitioners,

vs.

BARBARA A. BROCKLESBY, ET AL.,
Respondents.

REPLY BRIEF

GREGORY C. READ
(Counsel of Record)
NICHOLAS W. HELDT
PAUL M. HUMMER
SEDGWICK, DETERT, MORAN
& ARNOLD
One Embarcadero Center,
16th Floor
San Francisco, CA 94111
Telephone: (415) 781-7900

Of Counsel:
E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

Dated: January 13, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

TABLE OF AUTHORITIES CITED

Cases

	Page
Bank of Marin v. England, 385 U.S. 99 (1966)	4
Bone v. Refco Inc., 774 F.2d 235 (8th Cir. 1985)	3
Collis v. Ashland Oil & Refining Co., 722 F.2d 625 (10th Cir. 1983)	3
County of Dakota v. Glidden, 113 U.S. 222 (1885)	3
Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983)	3
Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc., 472 U.S. ____, 86 L. Ed. 2d 593 (1985)	2
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983)	4
Ely v. Blevins, 706 F.2d 479 (4th Cir. 1983)	3
King v. Ford Motor Co., 597 F.2d 436 (5th Cir. 1979)	3
McGowan v. King, Inc., 616 F.2d 745 (5th Cir. 1980)	3
Ouimette v. E.F. Hutton & Co., Inc., 740 F.2d 72 (1st Cir. 1984)	3
Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983)	3
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)	3
United States v. Hougham, 364 U.S. 310 (1960)	3
United States v. 3,317.39 Acres of Land, 481 F.2d 417 (8th Cir. 1973)	3

Other Authorities

First Amendment to the United States Constitution	passim
FAR § 97.20	2
13A Wright Miller & Cooper Federal Practice and Procedure § 3533.2 p. 248 (2d ed. 1984)	3

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeppesen & Company ("Jeppesen") respectfully makes the following points in reply to Respondents' opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

(1) Respondents do not dispute the essential facts underlying the Petition: (1) the Government was solely responsible for designing, flight testing and promulgating the instrument approach procedure at issue in this case; (2) this procedure was a government regulation with the force and effect of law; (3) Jeppesen accurately depicted this regulatory procedure on its approach chart; and (4) the jury was instructed that it must find Jeppesen liable, without fault, if the Government's procedure was defective and a proximate cause of the accident. This is exactly what the jury found.[1] These uncontroverted facts are all that are

---

[1] In a declaration filed after the trial and made a part of the record, juror Estelle N. Begley stated:

> In my opinion (and, I believe in the opinion of all the other jurors), the FAA negligently designed, approved and published the instrument approach procedure for the Cold Bay airport because it failed to incorporate an 8,000 ft. minimum reception altitude requirement in its 8260-5 form. The entire jury believed that the failure to include an 8,000 ft. minimum reception altitude in the FAA 8260-5 form rendered the instrument approach procedure defective and that this was the primary proximate cause of the crash.
>
> During the course of our deliberations, we carefully considered the question of whether the Jeppesen chart correctly and accurately portrayed the instrument approach procedure contained in the FAA Form 8260-5. I believe that there was unanimous agreement among the jurors that the content, manner and format of the Jeppesen chart was proper in all respects, and that there was nothing about the chart which changed, altered, distorted, or failed to include any of the information or specifications contained in the FAA Form 8260-5. We decided that the FAA had the sole authority over the data published in the FAA Form 8260-5 and that Jeppesen & Co. was required to

necessary for this Court to decide whether to consider on the merits the question presented by this Petition: "Does the First Amendment permit a private citizen to be held liable without fault for accurately publishing a law of the United States?"

(2) The Government is responsible for designing and promulgating instrument approach procedures for every civilian airport in the United States.[2] Jeppesen's charts, which communicate these regulations in an understandable form to those who are required to obey them, are used by every major air carrier in this country.[3] The life of every American who flies on an airliner depends upon the pilot's understanding and compliance with applicable instrument approach procedures. Contrary to Respondents' position, the information communicated by Jeppesen's chart, which was completely accurate and widely distributed, constitutes speech on "matters of public concern" at the "heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. ____, 86 L. Ed. 2d 593, 602 (1985).

(3) Respondents' assertion that Jeppesen is not entitled to the protection of the First Amendment because its charts "incite action" is specious. Instrument approach procedures are government regulations which pilots are required by law to follow, whether or not Jeppesen republishes them. The Government commands action; Jeppesen merely communicates information.

---

confine its graphic depiction to the precise information contained in the 8260-5 form. . . .

Although I am of the opinion that the Jeppesen chart accurately depicted the information contained in the FAA Form 8260-5, I felt it was necessary to return a verdict against Jeppesen according to the instructions.

Excerpt of Record 322:12-323:20. *Accord* declarations of jurors Elsie Rodgers and Mary K. Purser. Excerpt of Record 315-21.

[2] F.A.R. § 97.20.

[3] RT 2805:8-12.

(4) Respondents argue that because Jeppesen's chart is a product, it is not speech.[4] The Petition asks the Court to declare that the accurate publication of a regulation is a constitutionally protected activity, whether or not the medium of communication is a product.

(5) If the Court agrees that a private citizen cannot be held liable without fault for accurately publishing a government regulation, then the general verdict must be reversed. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962).[5]

(6) Jeppesen's satisfaction of the judgment in this action does not moot this appeal because:

> (A) A party may satisfy a judgment in order to avoid paying further post-judgment interest, expressly reserving its right to seek a reversal of the judgment and reimbursement. *United States v. 3,317.39 Acres of Land*, 481 F.2d 417, 419-20 (8th Cir. 1973).[6] In this case, interest on the judgment of $12,785,580.81 was accruing at the rate of 10.25% per year, compounded annually, or approximately $4,300.00 per day as of June 1985.

---

[4] Respondents' Brief at 16. This position is implicit in the Ninth Circuit's decision. See Appendix B at 14-15.

[5] As the court below recognized, this rule is equally applicable in diversity actions. Appendix B at 8; *see generally Bone v. Refco Inc.*, 774 F.2d 235, 242 (8th Cir. 1985); *Ouimette v. E.F. Hutton & Co., Inc.*, 740 F.2d 72, 74 n.2 (1st Cir. 1984); *Collis v. Ashland Oil & Refining Co.*, 722 F.2d 625, 627 (10th Cir. 1983); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1098-99 (11th Cir. 1983); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *King v. Ford Motor Co.*, 597 F.2d 436, 439 (5th Cir. 1979). The Sixth Circuit rule relied upon by Respondents thus appears to be an anomaly.

[6] *See generally United States v. Hougham*, 364 U.S. 310, 312 (1960); *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885); *Doe v. Brookline School Comm.*, 722 F.2d 910, 914-15 (1st Cir. 1983); *McGowan v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); 13A Wright Miller & Cooper *Federal Practice and Procedure* § 3533.2 p. 248 (2d ed. 1984), and cases cited therein.

(B) Jeppesen publishes thousands of charts containing the Government's procedures, and the issue raised by this Petition will undoubtedly arise in future cases unless this Court declares that the accurate dissemination of regulations is protected by the First Amendment. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 153 n.5 (1983).

(C) The Court's decision will necessarily have a direct effect upon Jeppesen's claim for indemnity against the Government. *See Bank of Marin v. England*, 385 U.S. 99, 100-101 (1966).

Respectfully submitted,

GREGORY C. READ
(Counsel of Record)
NICHOLAS W. HELDT
PAUL M. HUMMER
SEDGWICK, DETERT, MORAN & ARNOLD
One Embarcadero Center,
16th Floor
San Francisco, CA 94111
Telephone: (415) 781-7900

Of Counsel:
E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 331-4685